Supreme Court, U.S.
FILED

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No. ____

In the Supreme Court of the United States

LEE E. FANCHER,

Petitioner,

v.

CSX TRANSPORTATION, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the scope of *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), permit any apportionment of damages to non-railroad employers?

LIST OF ALL PARTIES

All parties to this proceeding are listed on the caption of the case.

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Petitioner Lee E. Fancher ("Petitioner") respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Cabell County, West Virginia.

OPINIONS BELOW

The order of the Supreme Court of Appeals of West Virginia denying Petition praying for an appeal from a judgment of the Circuit Court of Cabell County, West Virginia (App., *infra*, A-1), is unreported. The Final Dismissal Order (App., *infra*, A-2–A-3) and the Final Judgment Order (App., *infra*, A-4–A-9) of the trial court are unreported.

JURISDICTION

Petitioner's timely petition praying for an appeal from a judgment of the Circuit Court of Cabell County, West Virginia was denied by the Supreme Court of Appeals of West Virginia on February 15, 2007 (App., *infra*, A-1). Petitioner's underlying lawsuit was brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

The relevant portions of the Federal Employers' Liability Act ("F.E.L.A."), 45 U.S.C. §§ 51 and 53, are reproduced at App., *infra*, A-10–A-11.

STATEMENT OF THE CASE

Petitioner sued Respondent to recover damages for cumulative trauma injuries to his wrists (bilateral carpal tunnel syndrome) caused by his use of power and hand tools while working as an electrician. His lawsuit was brought

under the F.E.L.A., which is the sole remedy afforded to injured railroad workers. *New York Central R.R. Co. v. Winfield*, 244 U.S. 147, 152 (1917). Under the statute, a railroad carrier is liable for all injuries caused, in whole or in part, by its negligence. 45 U.S.C. § 51.

At trial, evidence was introduced that Petitioner was exposed to risk factors for carpal tunnel syndrome while working for Respondent, and while working for other employers before his railroad employment. The trial court then submitted a special verdict form, over Petitioner's objection, allowing the jury to apportion the injuries between Respondent's workplace and "alternative causes," which included Petitioner's non-railroad employment (App., *infra.*, A-8–A-9). By submitting the issue of apportionment to the jury the trial court ignored *Ayers v. Norfolk & Western Ry. Co.*, 538 U.S. 135 (2003), where this Court held "that the F.E.L.A. does not authorize apportionment of damages between railroad and non-railroad causes." *Id.* at 159. The jury returned a verdict apportioning damages between Petitioner, Respondent and "Other Causes" at 10%, 30% and 60%, respectively (App., *infra.*, A-9).

Because there is no right of appellate review in West Virginia, the trial court is Petitioner's court of last resort. The potential impact of this interpretation of *Ayers* is not limited to just a few cases. Indeed, Respondent is the fifth largest employer in the State.[1] Norfolk Southern, another railroad whose employees fall under the F.E.L.A., likewise has significant operations in the state.

STATUTORY BACKGROUND

Congress enacted the F.E.L.A. almost a century ago as a broad remedial statute to provide railroad workers relief for

---

[1] WORKFORCE West Virginia, a division of the Department of Commerce, reports that Respondent is the fifth largest employer in West Virginia for 2006.

injuries that were all too common in the railroad industry. *See Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949)(concurring opinion of Justice William O. Douglas noting the statute was "designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operation"). Under the Act, a railroad is liable for all injuries "resulting in whole or in part" from its negligence. 45 U.S.C. § 51.

In construing the terms "resulting in whole or in part," this Court determined that causality is established when a railroad's negligence "plays any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957).

A railroad's liability may be reduced under the F.E.L.A. under limited circumstances. For instance, under Section 53 of the Act, a railroad's liability may be reduced proportionally by a railroad worker's negligence if the railroad offers sufficient evidence where a jury could reasonably conclude that such negligence caused, in whole or in part, injury. *Norfolk Southern Rwy. Co. v. Sorrell*, ___ U.S. ___, 127 S.Ct. 799, 806 (2007). Accordingly, the issue of apportionment of fault (and damages) is between the railroad employee and employer.

Additionally, a railroad may reduce its damages by offering evidence that its negligence caused an aggravation of a preexisting condition. *Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 601 (1st Cir. 1996). A railroad "gets the benefit of apportionment of harm only if 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" *Id.* at 602 (quoting Restatement (Second) of Torts § 433A(2) comment i, at 439 (1965)). If the evidence fails to provide a reasonable basis for a jury to separate the harm caused by the preexisting condition and the harm caused by the railroad's negligence, the railroad is liable for all the damages. *Id.*

In 2003, this Court redefined and clarified how damages must be apportioned. In *Ayers v. Norfolk & Western Ry. Co.*, a case where workers claimed injury from asbestos exposure in the workplace, this Court held that a railroad may not escape liability for an occupational exposure injury by asserting that non-railroad employment also was a cause of the injury. *Ayers* unanimously rejected Norfolk & Western's argument that the F.E.L.A. permitted the apportionment of damages between its negligence and non-railroad causes. Speaking for the court, Justice Ginsburg wrote:

> **The statutory language, however, supports the trial court's understanding that the FELA does not authorize apportionment of damages between railroad and non-railroad causes.**
>
> * * *
>
> The statutory context bolsters our reading, for interpreting [45 U.S.C. § 51] to require apportionment would put that provision in tension with the rest of the statute. As recounted earlier, (citation omitted), several of the FELA's provisions expand a railroad's liability by abolishing common-law defenses that limited employees' ability to recover against their employers. Among the innovations, the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault. *See* §53 (citation omitted). **The statute expressly prescribes no other apportionment.**
>
> Essentially, then, Norfolk asks us to narrow employer liability without a textual warrant. Reining in employer liability as Norfolk

proposes, however, is both unprovided for by the language of the FELA and inconsistent with the Act's overall recovery facilitating thrust. Accordingly, we find Norfolk's plea an untenable reading of the congressional silence. (citation omitted)

Norfolk's view also runs counter to a century of FELA jurisprudence. No FELA decision made by this Court so much as hints that the statute mandates apportionment of damages among potentially liable tortfeasors. Indeed, *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), suggests the opposite. In *Rogers*, we described as "irrelevant" the question "whether the immediate reason" for an employee's injury was the proven negligence of the defendant railroad or "some cause not identified from the evidence." *Id.*, at 503, 77 S.Ct. 443; *see Id.*, at 508, 77 S.Ct. 443 ("[T]he inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit."). But if the FELA required apportionment among potentially liable tortfeasors, the existence of contributing causes would be highly relevant.

Also significant is the paucity of lower court authority for the proposition that the FELA contemplates apportionment. The federal and state reporters contain numerous FELA decisions stating that railroad employers may be held jointly and severally liable for injuries

> caused in part by the negligence of third parties, and even more recognizing that FELA defendants may bring indemnification and contribution actions against third parties under otherwise applicable state or federal law. Those third-party suits would have been unnecessary had the FELA itself authorized apportionment.

538 U.S. at 159-163 (emphasis supplied).

The decision in *Ayers* is unambiguous – the Act prohibits apportionment of damages between railroad and non-railroad employers. The only statutorily permissible comparison is fault of the respective parties.

FACTUAL BACKGROUND

Petitioner's lawsuit centered on his suffering bilateral carpel tunnel syndrome ("CTS") caused by his employment as an electrician for Respondent. The evidence at trial established that while working as an electrician for Respondent, Plaintiff was required to use a variety of hand tools where he was exposed to well-known CTS risk factors. There was also evidence that Petitioner's prior employment and non-railroad activities potentially exposed him to CTS risk factors.

Petitioner's medical expert, Douglas H. Linz, M.D., testified at trial that Petitioner's railroad employment was a significant contributing cause to his bilateral CTS. Respondent's medical expert, Bruce F. Haupt, M.D., testified that although Petitioner had a history of being exposed to CTS risk factors, both railroad and non-railroad, none of these activities caused his CTS. Dr. Haupt did not give an opinion as to the cause of Petitioner's injury because, in his opinion, most of the time it was impossible to definitely tell what

causes CTS. There was no expert evidence presented at trial, based on a reasonable degree of medical certainty, that any non-railroad activity caused Petitioner's CTS.

The trial court correctly instructed the jury on causation and aggravation of a preexisting condition. However, the court's verdict form instructed the jury to determine damages "without taking into consideration any percentage attributable to [plaintiff] or alternative causes" (App., *infra*, A-9)(emphasis in the original). It then submitted the issue of apportioning the percentage of Petitioner's "injuries and damages attributable to the negligence of the [Respondent], attributable to the negligence of the [Petitioner] or attributable to alternative causes" (App., *infra*, A-8).

By allowing the jury to apportion Petitioner's injuries between his railroad employment and "other causes," which included his exposure to CTS risk factors while working for non-railroad employers, the trial court simply ignored the mandate of *Ayers*.

REASON FOR GRANTING THE PETITION

The proper scope of apportionment is of critical importance to the thousands of railroad employees who are covered by the F.E.L.A. CSX, as the fifth largest employer in West Virginia, is involved in litigation in many circuits in the state. Clarifying the scope of *Ayers* is crucial for states like West Virginia, where there is no automatic right of review and the trial court's decision is frequently the final state decision on the merits – as it was both here and in *Ayers*. With the growth in occupational disease litigation, the question of apportionment to non-railroad employers will frequently reoccur in F.E.L.A. litigation both in West Virginia and other states.

Since *Ayers* was decided in 2003, other federal and state courts have recognized the rule strictly forbidding apportionment of fault to third parties. *See Schadel v. Iowa*

Interstate R.R. Ltd., 381 F.3d 671 (7th Cir. 2004)(Seventh Circuit recognized that a railroad may not reduce its liability by the negligence of a third-party tortfeasor); *Krueger v. Soo Line R.R. Co.*, 2005 WL 2234610 (E.D.Wis. 2005)(U.S. District Court recognized that a railroad may not reduce its liability by the percentage of negligence of settling non-railroad defendants); *Torrejon v. Mobil Oil Co.*, 876 So.2d 877 (La. Ct. App. 2004)(Louisiana Court of Appeals recognized that employer under the Jones Act may not apportion its fault with third-parties' fault); *Ward v. Kansas City Ry. Co.*, 157 S.W.3d 696 (Mo. Ct. App. 2004)(Missouri Court of Appeals held trial court erred when it allowed at trial evidence of a driver's negligence in a F.E.L.A. action since the driver was a third-party); *Seaford v. Norfolk Southern Rwy. Co.*, 159 Ohio App.3d 375, 824 N.E.2d 94 (2004), *rev'd on other grounds* 106 Ohio St.3d 430, 835 N.E.2d 717 (2005)(Ohio Court of Appeals held that F.E.L.A. did not permit the apportionment of damages based on the comparative fault between employers).

The decision of the West Virginia Circuit Court places it at odds with the post-*Ayers* decisions, and *Ayers* itself allowing Respondent to apportion damages with non-railroad causes, and most importantly, defeating the uniform application of F.E.L.A. law mandated by this Court. *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952).

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted.

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th of February, 2007, the following order was made and entered:

Lee E. Fancher, Petitioner Below,
Petitioner

vs. No. 063453

CSX Transportation, Inc., a corporation,
Respondent Below, Respondent

On a former day, to-wit, December 21, 2006, came the petitioner, Lee E. Fancher, by William Kvas and Richard L. Carlson, Hunegs, Stone, LeNeave, Kvas & Thornton, P.A.; and W. Michael Frazier, Frazier & Oxley, L.C., his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Cabell County, rendered on the 28th day of August, 2006, with the record accompanying the petition. Thereafter, on the 22nd day of December, 2006, came the respondent, CSX Transportation, Inc., by Melissa Foster Bird, Huddleston Bolen, LLP, its attorney, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

LEE E. FANCHER,
Plaintiff, CIVIL ACTION NO 04-C-0378
JUDGE DAVID M. PANCAKE

v,

CSX TRANSPORTATION, INC.,
a corporation,
Defendant.

FINAL DISMISSAL ORDER

On July 20, 2006, came the Plaintiff by counsel, William Kvas and W. Michael Frazier, and Defendant, CSX Transportation, Inc., by counsel, Melissa Foster Bird, for a previously noticed hearing on Plaintiff's Motion for a New Trial. After reviewing all pleadings and exhibits, hearing arguments of counsel and otherwise being fully informed, the Court **DENIES** Plaintiff's Motion for a New Trial.

It is the Order of this Court that Plaintiff's Motion for a New Trial be **DENIED**. The Clerk is directed to send a copy of this Order to all counsel of record.

Enter this 28th day of August, 2006

s/
Judge David M. Pancake

STATE OF WEST VIRGINIA
COUNTY OF CABELL,

I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON AUG 28 2006.

GIVEN UNDER MY HAND AND SEAL OF

SAID COURT THIS AUG 28 2006.
s/ Adell Chandler, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Prepared by:

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IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

LEE E. FANCHER,

Plaintiff,

v. CIVIL ACTION NO.: 04-C-0378
JUDGE: DAVID M. PANCAKE

CSX TRANSPORTATION, INC.,
a corporation,

Defendant.

FINAL JUDGMENT ORDER

On February 14, 2006, came the parties for trial for the above-styled civil action. William Kvas, Esquire and Michael Frazier, Esquire represented the Plaintiff, Lee Fancher. Melissa Foster Bird, Esquire of Huddleston Bolen LLP, represented the Defendant, CSX Transportation, Inc.

The Court and counsel conducted voir dire on February 14, 2006, and a jury of six qualified citizens of Cabell County, West Virginia, and one qualified alternate juror were seated. Opening statements were made by both parties.

The Plaintiff called lay and expert witnesses in his case-in-chief, admitted exhibits and rested his case on Wednesday, February 15, 2006. Defendant moved for Judgment as a Matter of Law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure and the Motion was denied.

Defendant called lay and expert witnesses in its case-in-chief, admitted exhibits and rested its case on Thursday,

February 16, 2006. Jury instructions were argued and a record was made of the Parties' objections to the charge. On Thursday, February 16, 2006, the Court charged the jury with the law. Closing arguments were made by both parties.

The alternate juror was excused prior to deliberations. The jury retired to deliberate at approximately 3:00 p.m. on February 16, 2006, with custody of all admitted exhibits.

At approximately 4:10 p.m. on February 16, 2006, the jury returned a unanimous verdict as reflected in the verdict form. Counsel for both parties declined to have the jury polled.

It is the Order of this Court that judgment in favor of Plaintiff, Lee Fancher, shall be and hereby is entered with respect to this Civil Action.

Enter this 14th day of March, 2006.

s/
The Honorable David M. Pancake

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON MAR 14 2006.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS MAR 14 2006.
s/ Addell Chandler CLERK

CIRCUIT COURT OF CABELL COUNTY WEST VIRGINA

Prepared by:

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IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINA

LEE E. FANCHER,

Plaintiff,

vs. **CIVIL ACTION NO. 04-C-0378**
JUDGE DAVID M. PANCAKE

CSX TRANSPORTATION, INC.,
a Corporation,

Defendant.

INTERROGATORIES AND VERDICT FORM

After you have retired to your jury room to consider your verdict, it is your duty to elect a foreperson. You should then read all of the questions on this paper before considering your verdict. Please read all of the questions before you answer any of them. You are instructed that your answer to each question which you find necessary to answer must be unanimous. After you have answered whichever questions you feel are necessary in accordance with the instructions on this Verdict Form, the foreperson should sign this form at the place indicated at the conclusion of the questions, and advise the bailiff that a unanimous verdict has been reached.

1. Was the Defendant, CSX Transportation, Inc., negligent in one or more of the particulars alleged?

YES X NO _____

If your answer to this question is "No," you will return a verdict for the Defendant and answer no further questions. Date and sign this form and notify the bailiff. However, if

your answer was "Yes," proceed to question 2.

2. Did the negligence of the Defendant, CSX Transportation, Inc., cause or contribute to the injuries and damages alleged by the Plaintiff?

YES__X__ NO _____

If your answer to this question is "No," you will return a verdict for the Defendant and answer no further questions. Date and sign this form and notify the bailiff. However, if your answer was "Yes," proceed to question 3.

3. Did the negligence of the Plaintiff, Lee E. Fancher, cause, in whole or in part, the injuries and damages alleged by him?

YES__X__ NO _____

Regardless of your answer to this question, proceed to question 4.

4. Were the injuries and damages alleged by Mr. Fancher attributable in whole or in part to any alternative causes other than the negligence of the Defendant or Plaintiff?

YES__X__ NO _____

Regardless of your answer to this question, proceed to question 5.

5. If you answered "Yes" to either question 2, 3 or 4, then what was the relative percentage of the Plaintiff's injuries and damages attributable to the negligence of the Defendant, attributable to the negligence of the Plaintiff or attributable to alternative causes?

Defendant, CSX Transportation	30 %
Plantiff, Lee Fancher	10 %
Other Causes	60 %
TOTAL (Must Equal 100%)	100 %

6. What amount, if any, would fairly compensate Mr. Fancher for his injuries and damages, without taking into consideration any percentage attributable to him or alternative causes:

A. Past lost income	$ 9,132
B. Past pain, suffering, mental anguish, inconvenience, annoyance and diminished capacity to enjoy life	$ 1,750
C. Future, pain, suffering, mental anguish, inconvenience, annoyance and diminished capacity to enjoy life	$ 0.0
TOTAL	$10,882

Do not reduce any of the above amounts by the percentage of Mr. Fancher's negligence, if any. The adjustment, if necessary, will be reduced later by the Court.

The undersigned does hereby attest that she or he is foreperson of the jury in this civil action, and that the foregoing answer or answers is or are the unanimous verdict of the jury.

s/ Michael D. Fannin
FOREPERSON

FEB 16 2006
DATE

45 U.S.C. § 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 53

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.